

**IN THE COURT OF APPEAL OF TANZANIA
AT TABORA**

CRIMINAL APPEAL NO. 55 OF 2017

(CORAM: MKUYE, J.A., WAMBALI, J.A., SEHEL, J.A.)

MANDE s/o MANYANYA.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from decision of the High Court of Tanzania at Tabora)

(Lukelelwa, J.)

Dated the 9th day of October, 2013

in

Criminal Session Case No. 8 of 2010

JUDGMENT OF THE COURT

11th & 17th December, 2020

SEHEL, J.A.:

In the High Court of Tanzania at Tabora, Mande s/o Manyanya (the appellant) was convicted with an offence of murder contrary to section 196 of the Penal Code, Cap. 16 R.E 2002 and given the statutory sentence of death by hanging. Dissatisfied, he appealed to this Court.

The main events relevant to the determination of the present appeal go like this:- The Information dated 3rd September, 2009 titled Criminal Sessions Case No. 4 of 2010 between the Republic versus Mande s/o

Manyanya and Sayi s/o Mshamindi (not subject to this appeal and we shall be referring to him as Sayi) alleged that, on 1st day of July, 2007 around 20:00 hrs at Ihapa village within the District and Region of Shinyanga, the appellant and Sayi did murder one Wande d/o Bulugu (the deceased). The Preliminary Inquiry proceedings, PI No. 10 of 2007 (the PI) which committed the appellant for trial before the High Court were finalized on 27th September, 2010. It is significant to point out here that the PI proceedings were in respect of three accused persons, namely, the appellant, Sayi and Juma Tungu @ John (Juma). During the PI proceedings, the charge against Juma was withdrawn under section 91 (1) of the Criminal Procedure Act, Cap. 20 R.E 2002 (the CPA) on 25th May, 2010. Consequently, Juma was discharged and the PI continued for the remaining two accused persons. Furthermore, on 8th September, 2010 when the case was called for committal proceedings, the Public Prosecutor (PP) sought an adjournment of the proceedings in order to amend the Information and bring a new Information following the death of Sayi. The prayer was granted and the PI was adjourned to 23rd September, 2010. The record of appeal bears out that the new Information was filed on 23rd September, 2010 and on the same date it was read over to the appellant

who was called not to plead thereto. The PI proceedings were then adjourned to 27th September, 2010 where the appellant was finally committed for trial before the High Court.

On 9th August, 2011 the appellant appeared before Lukelelwa, J (the trial judge, as he then was) for the preliminary hearing in the High Court of Tanzania sitting at Shinyanga in Criminal Session Case No. 101 of 2009. The parties to that Criminal Session were the Republic versus the appellant and Sayi. Part of the proceedings of that date reads:

"Notice of trial Information for murder contrary to section 196 of the Penal Code was duly served on the accused, now before the court on 09/08/2011.

Information is read over and explained to the accused in their own language and they were required to plead thereto.

Plea: 1st accused: 'Si kweli'

2nd accused: Dead"

Thereafter, a plea of Not Guilty to the charge of murder was entered. After the plea was taken and pursuant to section 192 of the CPA, the preliminary hearing (PH) was conducted to establish matters which were

not in dispute between the parties. However, the facts read over by the State Attorney were in respect of one accused person only, the appellant and they did not include Sayi who was reflected as the second accused person. Since, the appellant did not dispute the Post Mortem Examination it was admitted as Exhibit P1. After the preliminary hearing was concluded, the proceedings were adjourned to another date for trial.

The trial of the case begun on 4th October, 2013 whereby the Coram reads as follows:

"Date: 04/10/2013

Coram: Hon. S. B. Lukelelwa, Judge

*M/s Margreth Ndaweka, State Attorney for the Republic
assisted by*

*Accused: Names 1. Mande s/o Manyanya present 2. Sayi
Mshamindi – Dead is present under custody and
represented by Mr. Mweiro, defense counsel.*

*Interpreter Mr. A. Julius, English into Kiswahili and vice
versa.*

Emmanuel Madaki Kiswahili to Kisukuma and vice versa."

Thereafter, the Information to murder was reminded to the appellant. He denied the charge and the plea of not guilty was entered. The trial commenced by the prosecution calling three witnesses and tendered Extra Judicial Statement of the appellant which was admitted as Exhibit P2. The appellant relied on his own sworn evidence and did not bring any other witness. At the end, the trial court found the appellant guilty as charged, convicted and sentenced him to death by hanging. The judgment of the trial court appearing at page 90 of the record of appeal is titled as follows:

"IN THE HIGH COURT OF TANZANIA AT TABORA

(Tabora Registry)

SITTING AT SHINYANGA

CRIMINAL SESSION CASE NO. 101 OF 2009

THE REPUBLIC

VERSUS

1. MANDE S/O MANYANYA

2. SAYI S/O MSHAMINDI"

Aggrieved with both the conviction and sentence, the appellant lodged his notice of appeal to this Court followed by a six-point memorandum of appeal. Later on, pursuant to Rule 73 (2) of the Tanzania

Court of Appeal Rules, 2009 (the Rules), Ms. Stella Thomas Nyakyi, learned advocate who was assigned the brief to represent the appellant lodged a supplementary memorandum of appeal containing four grounds of appeal. However, for reasons soon to be unfolded, we shall not reproduce the grounds of appeal.

At the hearing of the appeal, the appellant was present in Court and he was being represented by Ms. Stella Thomas Nyakyi, learned advocate. On the other hand, Mr. Tumaini Pius Ocharo, learned Senior State Attorney appeared for the respondent Republic.

Before the hearing of the appeal could began in earnest, the Court invited parties to address it on the propriety or otherwise of the appeal regard being the apparent confusion on the record of appeal.

Mr. Ocharo readily conceded to the confusion and initially took issue with the numbering of the case in the appellant's notice of appeal. But when he was asked to comment on the names of the persons appearing in the Information and as to what transpired during the PI, PH and trial, he changed his line of argument and admitted that there was apparent confusion in the proceedings caused by the Information filed by the

respondent on 3rd September, 2009. He submitted that according to the record of appeal, the High Court acted on the Information that has the name of Sayi s/o Mshamindi, the 2nd accused person while basically by the time the preliminary hearing was conducted, he was deceased and he was not committed for trial. He added that even the trial proceeded against a deceased person which was not proper in law. With that submission, he prayed for the Court to invoke its revisional power under section 4 (2) of the Appellate Jurisdiction Act, Cap. R.E 2019 by nullifying the committal proceedings and that of the PH and trial court, quashing the conviction and set aside the sentence. On the way forward, he urged us to make an order of re-trial with a direction for fresh committal proceedings to be conducted and the appellant be left in the hands of the Director of Public Prosecutions because he believed there was cogent evidence against the appellant.

Ms. Nyakyi was in full agreement with observation made by the learned Senior State Attorney that there is confusion in the proceedings. She, however, urged us not to make an order for re-trial because she said, the appellant had been in custody for a long time ever since his arrest on the 6th July, 2007. She submitted that an order for re-trial would benefit the Republic as they would have an opportunity to correct their mistakes in

the Information hence it would highly prejudice the appellant. With that submission, she asked us to set the appellant free.

Mr. Ocharo countered the argument on the incarceration period that it was due to the process of law as the offence of murder is non bailable and the appellant was lawfully serving the sentence.

From the submission of both parties, it is not in dispute that one Sayi s/o Mshamindi, who appeared in the Information filed by the respondent on 3rd September, 2009 as a second accused person is no more. It is obvious from the record of PI proceedings of 8th September, 2009 which we have reproduced herein that the subordinate court was notified on the death of Sayi and there was a prayer for amendment of the charge. In view of the fact that the subordinate court was notified on the death of the second accused person it ought to have recorded the proceedings abated against him pursuant to the provision of section 224A of the CPA which provides:

"Every trial under this Part shall abate on the death of the accused person."

We wish to point out that the Part referred to under section 224A of the CPA is Part VII which, amongst others, contains in it the provisions relating to committal of accused person for trial to the High Court.

Furthermore, section 284A of the CPA deals with abatement of the trial in the High Court on the death of the accused person as follows:

"Every trial before the High Court shall abate on the death of the accused person."

It follows then that the abatement of the trial on the death of the accused person is a statutory requirement. The reason behind being that a criminal prosecution is concerned primarily with the punishment of an offender and not with the trial of an abstract issue about the truth or falsity of a prosecution case (see the case of **Bondada Gajapathy Rao v. State of Adhra Pradesh** (1964) AIR 1645; (1964) SCR (7) 251). Since in the present appeal, there was an information of the death of the 2nd accused person the two lower courts ought to have abated the proceedings against him. To the contrary the committal court proceeded to commit the appellant on the Information that has in it the name of the deceased accused person. Equally, the trial court proceeded to hear and determine

the case on merit against the deceased accused person. That was an error and it was a violation of sections 224A and 284A of the CPA.

More so, the error occasioned a confusion in the proceedings as rightly submitted by the counsel for parties. The confusion begun on 23rd September, 2010 where the PP prayed for amendment of the Information and substitute for a new one. For clarity, we wish to reproduce the proceedings of that date. It is as follows: -

"23/9/2010

Coram: R. Magige-RM

Pros: Mawalla- S/A

C/C: Shilogile

Accused: Present

Public Prosecutor: We have a new Information, we pray to substitute and bring a new one.

Court: New Information is read over and explained to the accused person who is called not to plead.

Orders: 1. P. I. on 27/9/2010

2. Accused further remanded in custody

SGD: R. Magige

Resident Magistrate

23/9/2010."

The above excerpt clearly shows that there was an amendment of the Information but we have failed to find the substituted Information in the entire record of appeal. What we managed to find is the Information dated 3rd September, 2009 which appears at page 30 of the record of appeal and it is this Information that the trial court acted upon in trying and convicting the appellant.

Perhaps at this juncture we should provide the procedure for amendment of an Information which is contained under section 276 (2) and (3) of the CPA that reads:

"(2) Where before a trial upon information or at any stage of the trial it appears to the court that the information is defective, the court shall make an order for the amendment of the information as it thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendment cannot be made without injustice; and all

such amendments shall be made upon such terms as to the court shall seem just.

(3) Where an information is amended, a note of the order for amendment shall be endorsed on the information and the information shall be treated for the purposes of all proceedings in connection therewith as having been filed in the amended form."

The above provision of the law was considered in the case of **Bahati Bukombe and 2 Others v. The Republic**, Criminal Appeal No. 568 of 2017 (unreported). In that appeal, the learned State Attorney sought leave and was granted to amend the Information but the amended Information endorsed by the trial court was no-where to be found in the record of appeal. The Court thus revisited the provisions of section 276 (2) and (3) of the CPA and said: -

"According to the above provisions of the law (that is section 276 (2) and (3) of the CPA), the court can order for an amendment of the information if necessary, on the terms which it deems just. If the court makes such an order, it is required under subsection (3) to endorse on the information, to enable such information to be treated for

purpose of all proceedings in connection therewith as having been filed in the amended form.”

In this appeal it has been shown that on 23rd September, 2010 there was a prayer for amendment of the Information made by Mawalla, learned State Attorney and the new Information was read over to the appellant. As we have already indicated above, we failed to find in the original and typed record of appeal the amended Information endorsed by the court. The law requires and we expected to see in the record, if at all there was an amendment of the Information, an endorsement on the Information for it to be treated for the purposes of all proceedings in connection therewith as having filed in the amended form.

That apart, the trial judge was also supposed to abate the proceedings against the 2nd accused person pursuant to section 284A of the CPA after he had been informed of the status of the 2nd accused person when conducting the PH. He should have also made an order for amendment of the Information in terms of section 276 (2) of the CPA in order to remove the name of the second accused person. Nonetheless, all these were not done by the trial court. The failure to observe the

procedure, to say the least, culminated into the muddling of the trial since the name of the deceased accused person continued to be retained not only in the Information but also during the entire trial of the murder case. We say so because we have shown herein that the proceedings of 9th August, 2011 shows that the second accused person was dead and at the same time was present under custody. He was further indicated that he was being represented by Mr. Mweiro, learned advocate. This is beyond imagination. How can a dead person be present in court? With greatest respect we are dismayed to see such kind of proceedings in the High Court

Another confusion is gleaned from the judgment of the trial court appearing at pages 90 to 101 of the record of appeal. The judgment maintained the name of Sayi s/o Mshamindi and he was referred to as the 2nd accused person but there was no mention about him in the body of the entire judgment. Failure to say or comment anything about the 2nd accused person leaves a lot of unanswered questions such as what was his role in the charged offence (was he a co-accused or an accomplice) and what happened to him (was he discharged, released or did the case against him abate).

On account of what we have highlighted above, we are satisfied that the trial of the appellant was marred with irregularity and confusion which rendered the entire trial including the committal order, preliminary hearing, trial and judgment a nullity.

As to the way forward, we are reluctant to go along with the learned Senior State Attorney's prayer to order a re-trial for two main reasons. **One**, the appellant was highly prejudiced as he was jointly tried along with the deceased person. We believe that the trial which was conducted with an Information that had the name of the deceased person traumatized the appellant. **Two**, the apparent defect of retaining the name of the deceased person in the Information could not have lawfully commenced the trial against the appellant.

All said and done, we invoke our powers of revision vested on us under section 4(2) of the AJA and we nullify the committal order, the proceedings of the preliminary hearing, the court trial proceedings and its judgment. We further quash the conviction for murder and set aside the sentence of death by hanging. We order for the immediate release of the

appellant, **Mande s/o Manyanya**, from custody unless otherwise held for other lawful reasons.

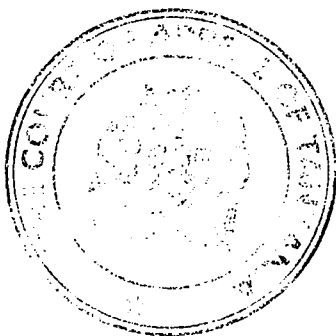
DATED at TABORA this 17th day of December, 2020.

R. K. MKUYE
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 17th day of November, 2020 in the presence of Appellant in person and Ms. Stella Nyakyi, learned counsel for the Appellant and Mr. Tumain Pius Ocharo, State Attorney for the Respondent, is hereby certified as a true copy of the original.




B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL